Supreme Court, U.S.
FILED

98 993 DEC 18 1998

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No. _____

In The

Supreme Court of the United States

October Term, 1998

DALE LYNN RYAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the court of appeals employed the wrong standard of review when it reviewed for abuse of discretion the district court's determination that improper suppression of exculpatory evidence did not violate *Brady v. Maryland*.

Whether the district court and court of appeals violated the legal standard of *Brady* and its progeny by failing to analyze materiality in terms of the cumulative effect of the suppressed exculpatory evidence of government-conducted tests on physical evidence from the scene, and government expert opinions, regarding the nature and cause of burn patterns.

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PETITION FOR A WRIT OF CERTIORARI

Dale Lynn Ryan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case, affirming the denial of his motion for new trial.

OPINIONS BELOW

The opinion of the court of appeals is reported at 153 F.3d 708 (8th Cir. 1998). App., *infra*, 1-12. The opinion of the district court is unreported. App., *infra*, 13-34.

JURISDICTION

The court of appeals entered its judgment on August 20, 1998, and denied the petitioner's petition for rehearing on September 21, 1998. App., *infra*, 1, 35. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This petition involves the Fifth Amendment of the Constitution of the United States, which provides:

> **Criminal actions – Provisions concerning – Due process of law and just compensation clauses.**
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in

> the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

On July 15, 1991, Petitioner, Dale Ryan, was indicted in the Southern District of Iowa under the federal anti-arson statute, 18 U.S.C. § 844(i), for a fire that destroyed the Ryan Fun and Fitness Center in West Burlington, Iowa. Two volunteer firefighters died attempting to extinguish the fire. Ryan was found guilty following trial in September 1991, and was sentenced to 328 months in prison on February 6, 1992. The conviction and sentence were upheld by a divided panel in *United States v. Ryan*, 9 F.3d 660 (8th Cir. 1993), and affirmed on rehearing *en banc*, in *United States v. Ryan*, 41 F.3d 361 (8th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995).

Ryan filed a motion for new trial based on newly discovered evidence pursuant to Fed. R. Crim. P. 33 on October 30, 1996.[1] Ryan claimed, in part, that the

[1] Ryan's arguments based on newly discovered evidence were 1) that the government violated *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding exculpatory material evidence; 2) that new scientific evidence requires a new trial; and 3) that perjury or false testimony resulted in Ryan's conviction.

government violated *Brady v. Maryland* and its progeny[2] by suppressing material exculpatory evidence, requiring a new trial. Following an evidentiary hearing, the district court denied the motion for new trial on October 2, 1997. App., *infra*, 13-29. Although the district court found that evidence of governmental tests and expert opinions was exculpatory and had been suppressed, it ruled that the evidence was not material to the issue of guilt, denying the motion for new trial on this issue and the other issues raised. On August 20, 1998, the Court of Appeals for the Eighth Circuit affirmed. It reviewed the district court's rulings, including those on alleged *Brady* violations, for abuse of discretion and found none. App., *infra*, 1-12. Ryan filed a petition for rehearing, which the court of appeals denied on September 21, 1998. App., *infra*, 35.

1. Fire investigation and trial

Dale Ryan managed the fitness center prior to its closing December 6, 1989. Fire destroyed the fitness center on January 1, 1990. The State Fire Marshal's Division of the Iowa Department of Public Safety conducted the investigation into the origin and cause of the fire. Other state, local, and federal law enforcement joined the investigation.

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[2] *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1996); *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995).

Special Agents Richard Ward and Carl Svenson of the State Fire Marshal's Office decided early that the fire was incendiary and resulted from pouring a liquid accelerant on the floors in the fitness center and igniting it to initiate and spread the fire. The arson finding was based on interpretation of floor burn patterns at the fire scene. No accelerant was ever found. Lab tests detected none in any of the 26 fire debris samples taken from burn patterns at the scene, and none were ever found in or on any other physical evidence, or in Ryan's possession, on his belongings, or in his home or vehicles. Ward testified at trial that the floor burn patterns were caused by flammable liquid. Ward emphasized the significance of deeply charred burn patterns on the floors as, in his opinion, reflecting use of a liquid accelerant. (Ex. 2H; Tr. IV, pp. 74-8)[3] The government's claim of use of an accelerant was entirely based on interpretation of floor burn patterns, observations, and opinions relating to floor burns.

The federal government's case at trial thus was circumstantial, premised on the theory that the fire was set in several places by pouring a flammable liquid on the floor of the fitness center in the lounge, bar, and sauna, and free weight, nautilus, and aerobics rooms. At sentencing, the prosecutor argued Ryan should be given a first degree murder offense level for setting multiple fires

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[3] Record cites are to hearing exhibits and transcript pages, e.g., (Ex. 2H; Hg. p. 9), and trial transcript volumes and pages, e.g., (Tr. IV, p. 74).

by pouring flammable liquids on the floor.[4] The district court's adoption of this theory enhanced Ryan's sentence by more than 20 years.[5] (Sent. Tr. pp. 17-27, 38, 40-1)

2. Newly discovered evidence of Brady violation

Before trial, on August 23, 1991, Ryan filed a "Production/Brady Request" seeking production of tests, reports, and any evidence regarding burn patterns and any differing opinions of government experts.[6] After

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[4] The prosecutor argued malice aforethought for the first-degree murder sentencing guideline:

> [t]he way the fire was set . . . with multiple fires, with the use of accelerants, the evidence being that in places flammable liquids were used which would accelerate the fire, make it a raging inferno. . . .

(Sent. Tr. pp. 26-27)

[5] Ryan's sentence went from Level 24 (51-63 months) to Level 40 (292-365 months). His ultimate sentence of 328 months constituted an enhancement of over 20 years. *Ryan, supra,* 9 F.3d at 671-3.

[6] The pertinent part of the *Brady* request sought, *inter alia*:

> [a]ll tests and reports . . . not already produced[,] [s]tate who and in what detail the federal experts or independent experts reviewed the evidence and to what extent their conclusions agreed or differed with each other, and if they differed who differed and where are the opinions to that effect[,] [and] [a]ny evidence which would support or reject the opinions of Defendant's experts including how a burn pattern misdiagnosis could lead one to the conclusion that accelerants were used.

(Ex. 2X) The prosecution indicated anything responsive was disclosed. (Ex. 2X)

trial, Ryan discovered that, contrary to its response to the *Brady* request, the prosecution had never disclosed that on July 10, 1991, prior to the *Brady* request, the State Fire Marshal agents, and Agent Van Vleet from the Bureau of Alcohol, Tobacco and Firearms (ATF), conducted burn tests at a training site in Independence, Iowa, utilizing floor samples removed from the scene. (Independence is about a 135-mile drive from West Burlington.) App., *infra*, 17. A photographer retained by Svenson to photograph and videotape the tests was present. Post-trial the defense learned of these tests pursuant to a Freedom of Information Act request directed to the ATF. Svenson and Van Vleet were aware the federal grand jury was investigating the fire when they conducted the tests. Ryan was indicted a week later.

Post-trial the defense discovered these test samples (Exs. M and N), and learned the tests were arranged, videotaped and photographed at Svenson's direction, and that Van Vleet attended; no documentation, photos or video of the tests have ever been produced. The government withheld the fact of the tests and their results, and the flooring pieces used in these tests. The defense learned that neither Ward nor DeHaan, who testified at trial as to the government's arson theory, was informed of the testing. At trial, Ward sponsored the theory that deeply charred floor burn patterns at the scene had the appearance of flammable liquid burn patterns.

Three tests were conducted – an alcohol burn test, a flashover test, and a drop-down test. Svenson attempted to test the government theory that the floor burn patterns in various locations were from flammable liquid used to start the fire, and the defense theory that the patterns

were from drop-down, flashover, or radiant heat. (Hg. pp. 229-306, 440-51, 540-1)

Alcohol burn test: The alcohol burn test was performed by pouring flammable liquid, denatured alcohol, directly on the wood flooring and igniting it. This test failed to burn the wood where flammable liquid was poured and it showed no char burn pattern (Ex. 1N), thus contradicting the government's fire causation theory by failing to generate deep burn patterns similar to the floor patterns at the fire scene which the government claimed were "classic flammable liquid burn patterns." (Hg. pp. 375-8, 440-1) Fire science experts, Fred Fisher and Fred Mowrer, registered fire protection engineers, testified at the new trial hearing that the failed alcohol burn test showed flammable liquids would not have caused the deep charring on wood floors in the fitness center bar, lounge, and nautilus room, where the patterns which the government claimed were flammable liquid patterns were located. They testified this evidence would have been important to the defense regarding how char patterns are formed and whether they could be caused by flammable liquids, particularly in 1991 when there was less scientific appreciation among arson investigators for how char patterns are formed. (Hg. pp. 375-81, 440-1)

Flashover test: A flashover test was conducted in an effort to test and discredit a possible defense theory as to genesis of the burn patterns. Svenson's test did not create the proper test conditions and the conditions did not achieve flashover. (Hg. pp. 60, 125-26)

Drop-down test: The drop-down test was an attempt to test the defense theory of drop-down and radiant heat.

It involved placing combustible materials, including racquetball wall debris and flammable liquid, on the floor (Ex. 1M) and igniting it. The materials burned on the floor and showed deep char patterns, supporting Ryan's theory that the floor burn patterns were caused by radiant heat associated with drop-down of building contents, and not by flammable liquids. The drop-down test char patterns were similar to the patterns which the government claimed at trial to be flammable liquid patterns. Contrary to the district court's conclusion, the government did not concede drop-down with respect to floor burn patterns at trial. (Ex. 3F, pp. 124-30; Tr. III, p. 185; Tr. XIII, pp. 52, 80, 138-9)

The defense also discovered post-trial that government expert John DeHaan, who testified at trial on rebuttal, held the exculpatory opinion, never disclosed, that Ward, who proffered the arson theory at trial, was wrong in believing the deep char patterns on the floors were caused by flammable liquids. DeHaan's withheld opinions were that most of the deep burn patterns identified as "classic flammable liquid burn patterns" were not caused by flammable liquids. The withheld evidence was that DeHaan did not believe the burn patterns in the bar, lounge, and exercise and nautilus rooms were from flammable liquids, and did not believe that the fire in the sauna was caused by flammable liquid poured on the floor. (Hg. pp. 537-42, 613-4, 622-3, 630-2, 676-9; Ex. 1Z)

At the new trial hearing, the government conceded the tests and results should have been disclosed, but denied they were material. The prosecutor testified she would have disclosed them had she known of them.

The district court correctly found that the government did not reveal the tests to the defendant, and that the defendant could not, with reasonable diligence, have known of the tests. App., *infra*, 18-19. The district court correctly recognized the results of these tests on hardwood flooring from the fitness center racquetball flooring were exculpatory, and that DeHaan's difference of opinion with Ward and Svenson was not disclosed to the defense and was exculpatory. App., *infra*, 24-25.

The district court agreed with Ryan that the government improperly withheld favorable, exculpatory evidence of the burn tests and their results, and of government expert DeHaan's opinions. The district court found Ryan established the first three requisites under *Brady* for a new trial. App., *infra*, 23. The district court, however, concluded the fourth requisite of *Brady*, materiality, was not met and the evidence was not material. The district court found that had the evidence been disclosed, there was not a reasonable probability the outcome of the trial would have been different. App., *infra*, 24-27. Addressing materiality, the district court phrased the issue rhetorically regarding reasonable probability of a different result as "were the Independence test evidence and DeHaan's opinion, considered collectively, material?" App., *infra*, 25. Answering "no," the district court said its confidence in the guilty verdict was not undermined, and discussed the effect the exculpatory evidence would have had in light of the "abundance of other evidence that

supported the government's multi-origin arson fire theory." App., *infra*, 25.[7]

Ryan appealed the district court's ruling, challenging the materiality analysis as being factually incorrect and legally flawed. He claimed the district court improperly analyzed the materiality of the suppressed evidence under *Kyles v. Whitley*, 514 U.S. 419 (1995), and apparently applied a sufficiency of the evidence analysis which *Kyles* prohibits. Ryan claimed the standard of review on the *Brady* claim, including the finding as to materiality, should be *de novo*.

The court of appeals affirmed denial of the *Brady* claim and motion for new trial without discussing the split in the circuits on which standard of review to apply, citing to its own decisions and a Seventh Circuit decision.[8] App., *infra*, 5-6. The court of appeals held that the standard of review of a denial of a motion for new trial based on *Brady* violations was abuse of discretion, despite petitioner's request for *de novo* review. App., *infra*, 5-6. The court made no attempt to harmonize prior holdings of *de novo* review in the *Brady* context.[9] It then deferred to

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[7] The district court at no time mentioned that it enhanced Ryan's sentence 20 years in reliance on this theory. App., *infra*, 13-29.

[8] *United States v. Stuart*, 150 F.3d 935 (8th Cir. 1998); *United States v. Kern*, 12 F.3d 122, 126 (8th Cir. 1993); *United States v. Williams*, 81 F.3d 1434, 1437 (7th Cir. 1996), *cert. denied*, 118 S. Ct. 723 (1998).

[9] *See, e.g., United States v. Duke*, 50 F.3d 571 (8th Cir. 1995), *cert. denied*, 516 U.S. 885 (1995) (habeas case).

the district court's finding that the suppressed evidence was not material, and affirmed. App., *infra*, 6-9.

Although the court of appeals acknowledged some of the teachings of *Kyles*, it did not acknowledge that materiality "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal[.]" *Kyles, supra*, 514 U.S. at 434. Rather, the court of appeals stated that "materiality is not established through the mere possibility that the suppressed evidence might have influenced the jury." It further noted that the *Bagley* and *Kyles* materiality principles did not "restrict [the court's] consideration of the untainted evidence that was presented to the jury." App., *infra*, 7.

Rather than conduct the *Brady* analysis required by *Kyles*, apparently in the misapprehension that deference to the district court obviated this requirement, the court of appeals failed to consider the impact of the exculpatory evidence in the hands of competent defense counsel on the defendant's case or prosecutor's case, or on punishment. *See Kyles*, 514 U.S. at 441-54. Finding "it is not reasonably probable that the evidence would have changed the *outcome* had it been disclosed[,]" the court of appeals held the district court did not abuse its discretion. App., *infra*, 9 (emphasis added). Neither the court of appeals nor district court expressed confidence that Ryan had received a fair trial, as *Kyles* requires. *Kyles, supra*, 514 U.S. at 434.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's decision that abuse of discretion is the standard of review of the district court's denial of a motion for new trial based on *Brady* violations is in conflict with decisions of several other circuit courts. This decision also conflicts with the Eighth Circuit's own decisions applying *de novo* review to *Brady* claims arising in other circumstances. This case highlights the conflict in the circuits on the standard of review to be applied to alleged *Brady* violations discovered after trial. This case provides an opportunity to determine the standard of review for the federal courts of appeal to apply in analyzing alleged *Brady* violations that serve as a basis for a motion for new trial.

Applying the abuse of discretion standard of review, the court of appeals failed to promote uniformity in the federal courts, and, in fact, interfered with uniformity. Use of this highly deferential standard by the court of appeals impairs review of application of the proper *Brady* principles requiring government disclosure of exculpatory evidence to ensure fair trials. This decision conflicts with the Supreme Court's high standards to protect justice and the constitutional right to due process set forth in *Brady* and its progeny.

The court of appeals also misapprehended the legal standards set down by this Court for analyzing *Brady* issues, and in particular, for analyzing materiality of the suppressed evidence. The court of appeals' and district court's decisions in this case as to the immateriality of the undisclosed *Brady* evidence, and their findings that *Brady* was not violated, are contrary to this Court's decisions.

Both courts applied the wrong standard of materiality in determining the *Brady* issues in this case.

A. The Court Of Appeals' Application Of An Abuse Of Discretion Standard Of Review To The District Court's Denial Of A New Trial Motion Based On Alleged *Brady* Violations Is In Conflict With Other Circuits' Standard Of Review, And With Its Own Standard In Other *Brady* Cases, And Is Contrary To The Supreme Court's Due Process Requirements Of *Brady* And Its Progeny

The Eighth Circuit in this case specifically held that an abuse of discretion standard applies to review of the trial court's denial of the motion for new trial. The court of appeals cited its own cases[10] and relied upon the Seventh Circuit decision of *United States v. Williams*, 81 F.3d 1434, 1437 (7th Cir. 1996), *cert. denied*, 118 S. Ct. 723 (1998), for authority. In announcing this standard, the Eighth Circuit implicitly rejected petitioner's argument that *de novo* review should apply. It did not acknowledge other circuits' application of the *de novo* standard of review where *Brady* violations are in issue, nor even its own *de novo* review of an alleged *Brady* violation in a § 2255 proceeding.[11] App., *infra*, 5-6.

The standard of review applied to denial of a motion for new trial based on alleged *Brady* violations, to *Brady*

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[10] *United States v. Stuart*, 150 F.3d 935, 937 (8th Cir. 1998); *United States v. Kern*, 12 F.3d 122, 126 (8th Cir. 1993).

[11] *See Stuart, supra*, 150 F.3d at 937.

determinations that arise otherwise, and to specific aspects of a *Brady* determination, varies among the circuits. The Second, Fifth, and Ninth Circuits have reviewed *de novo* a denial of a motion for new trial based on a *Brady* determination.[12] The Tenth Circuit has reviewed *de novo* the *Brady* issue of denial of a motion for new trial, while generally reviewing the denial of the new trial motion for abuse of discretion.[13] The Seventh and Eighth Circuits have reviewed denial of a motion for new trial based on a *Brady* determination for abuse of discretion,[14] and the First Circuit has reviewed for "manifest abuse of discretion."[15] Where a *Brady* determination is challenged on direct appeal of a conviction, or in a habeas corpus or Section 2255 proceeding, or in an attack on a guilty plea, the circuit courts generally have reviewed the *Brady* determination *de novo*.[16] The Third Circuit,

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[12] *United States v. Zagari*, 111 F.3d 307, 320 (2d Cir.), *cert. denied*, 118 S. Ct. 445 (1997); *United States v. Gonzales*, 121 F.3d 928, 946 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 726 (1998); *United States v. Zuna-Arce*, 44 F.3d 1420, 1425 (9th Cir. 1995).

[13] *United States v. Hughes*, 33 F.3d 1248, 1251 (10th Cir. 1994).

[14] *United States v. Williams*, 81 F.3d 1434, 1437-38 (7th Cir. 1996), *cert. denied*, 118 S. Ct. 723 (1998); *United States v. Stuart*, 150 F.3d 935, 937 (8th Cir. 1998).

[15] *United States v. Anderson*, 139 F.3d 291, 296 (1st Cir. 1998).

[16] *United States v. McLeary*, 112 F.3d 511, 1997 WL 215525 (4th Cir. 1997) (unpublished) (collateral attack on guilty plea reviewed *de novo*); *United States v. Dixon*, 132 F.3d 192, 199 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1581 (1998) (*de novo* review of *Brady* determination); *United States v. Phillip*, 948 F.2d 241, 250 (6th Cir. 1991), *cert. denied*, 504 U.S. 930 (1992) (direct appeal; *de novo* review of *Brady* determination); *Norris v. Schotten*, 146 F.3d 314, 334 (6th Cir.), *cert. denied*, 1998 WL 480110 (1998) (*de novo* review of *Brady* determination in habeas corpus proceeding);

however, has applied a mixed standard of review, reviewing *Brady* legal conclusions *de novo*, but related factual findings for clear error.[17]

Division of authority exists not only among different circuits, but also internally within several circuits. The Fifth Circuit has applied a *de novo* review to a *Brady* determination on denial of a motion for new trial,[18] but has also applied the abuse of discretion standard.[19] The Ninth Circuit also has applied the standards inconsistently, recently reviewing *de novo* the denial of a new trial motion based on *Brady* violations,[20] while it previously reviewed the denial of a new trial motion for abuse of discretion, although it reviewed *de novo* the challenge to a conviction based on *Brady*.[21] The Eighth Circuit reviewed

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United States v. Duke, 50 F.3d 571, 576 (8th Cir. 1995), *cert. denied*, 516 U.S. 885 (1995) (*de novo* review in § 2255 proceeding); *United States v. Bracy*, 67 F.3d 1424, 1428 (9th Cir. 1995) (direct appeal; *de novo* review); *United States v. Woodley*, 9 F.3d 774, 777 (9th Cir. 1993) (direct appeal; *de novo* review); *United States v. DeLuna*, 10 F.3d 1529, 1534 (10th Cir. 1993); *United States v. Mejia*, 82 F.3d 1032 (11th Cir.), *cert. denied*, 117 S. Ct. 188 (1996) (direct appeal; *de novo* review).

[17] *United States v. Ramos*, 27 F.3d 65, 67 (3d Cir. 1994).

[18] *United States v. Gonzales*, 121 F.3d 928, 946 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 726 (1998).

[19] *United States v. Cisneros*, 112 F.3d 1272, 1278 (5th Cir. 1997).

[20] *United States v. Zuna-Arce*, 44 F.3d 1420, 1425 (9th Cir. 1995), *citing United States v. Woodley*, 9 F.3d 774, 777 (9th Cir. 1993).

[21] *Compare United States v. Woodley*, 9 F.3d 774, 777 (9th Cir. 1993) (*de novo* review), *with United States v. Marashi*, 913 F.2d 724, 731-32 (9th Cir. 1990) (if court of appeals decides district court

a *Brady* determination *de novo* when it arose in a § 2255 action,[22] where the court reviewed issues of law as well as issues involving mixed questions of law and fact *de novo*, but clearly decided to review for abuse of discretion here on denial of the motion for new trial. App., *infra*, 5-6.

The Supreme Court in *Agurs* recognized that a different legal standard from that applied to a usual motion for new trial based on newly discovered evidence should be applied to an alleged *Brady* violation, because of the nature of the violation, rejecting the typical Rule 33 standard. *Agurs, supra*, 427 U.S. at 111. The Supreme Court noted:

> [T]he fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. . . . [T]he defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal. If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.

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correctly decided *Brady* issue, review of denial of new trial is for abuse of discretion).

[22] *Duke, supra*, 50 F.3d at 576 (*de novo* review applied to 28 U.S.C. § 2255 proceeding; issue was alleged *Brady* violation warranting a new trial, which the district court denied).

Agurs, supra, 427 U.S. at 111. By implication, the Supreme Court's rejection of the typical Rule 33 legal standard where the newly discovered evidence is *Brady* evidence would also indicate rejection of the typical abuse of discretion standard on a Rule 33 motion based on newly discovered evidence from a neutral source. Further, although the standard of review was not specifically addressed, the Supreme Court's analysis in *Kyles* appeared to be *de novo*, particularly Justice Souter's discussion of the facts. *Kyles, supra*, 514 U.S. at 441-54. The concurrence in *Kyles* also implied that *de novo* review is required, referring to the necessity for independent review. *Kyles, supra*, 514 U.S. at 455 (Stevens, J., concurring). If, on *certiorari*, this Court can take the care to review *de novo* a *Brady* claim, surely the court of appeals should be expected to apply the same level of review.

A defendant's due process right to a fair trial is at stake where a *Brady* violation is claimed, which arises due to the government's failure to disclose favorable evidence. Here, it was the government's failure to disclose evidence, which it was required to disclose, resulting in the *Brady* issue not coming to light until after trial and direct appeal, so that the *Brady* issue could be raised only by motion for new trial. *See Agurs, supra*, 427 U.S. at 111. It is unfair and inconsistent to apply a different standard of review to a *Brady* finding when raised by way of a motion for new trial, as opposed to a direct challenge to a conviction, particularly when it is the government's failure to follow its due process requirements that determines the procedural posture in which the *Brady* issue is raised.

It also is unfair and inconsistent to allow the standard of review of a potential constitutional violation, in federal court, to be dependent upon the circuit in which the case is brought and upon the standard applied by that particular circuit court. Uniformity of the standard of review on this constitutional issue should be required. Moreover, the required standard of review of a *Brady* issue, even on a motion for new trial, should be clarified as *de novo*, especially in view of the painstaking efforts of this Court to establish the strict legal standard to apply to *Brady* issues to ensure justice.

The heart of the *Brady* issue in this case is not whether the evidence was suppressed, or was exculpatory, which questions were both answered affirmatively by the district court and Eighth Circuit, but whether the undisclosed, favorable evidence was material. An issue of this nature, mixed in law and fact, has constitutional significance that should require more than a highly deferential, discretionary review. In his concurrence in *Kyles*, Justice Stevens inferentially indicated *de novo* review is the appropriate standard for *Brady* review:

> [w]e should independently review the record to ensure that the prosecution's blatant and repeated violations of a well-settled constitutional obligation did not deprive petitioner of a fair trial.

Kyles, supra, 514 U.S. at 455 (Stevens, J., concurring).

The court of appeals opined that discretionary review of the *Brady* issue on motion for new trial was acceptable because the trial was hard-fought. App., *infra*, 6. This rationale does not justify rejection of *de novo* review. Each

criminal trial where prolonged imprisonment or death is a possible punishment is hard-fought; yet that should not be determinative of whether review is discretionary or *de novo*. Clearly, *Kyles* was a hard-fought capital case, yet that fact did not prevent the Supreme Court's apparent *de novo* review. The court of appeals' adoption of deferential, discretionary review of *Brady* violation claims, if permitted to stand, would have the practical effect of precluding a defendant from being able to show on appeal that the district court should have found a material *Brady* violation. The focus of review should not be on how much deference to give to the finder, but on whether the finding is correct, and the defendant received a fair trial.

Discretionary review as to whether or not a constitutional violation occurs should not be permitted. *De novo* review of determination of a *Brady* violation on denial of a motion for new trial is dictated by the seriousness of the constitutional disclosure requirements imposed on the government by *Brady*, and the corrosive effect of *Brady* violations on a defendant's right to a fair trial. A uniform standard consistently applied, uninfluenced by procedural posture, should be required to ensure that a defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles, supra*, 514 U.S. at 434.

B. The Decision Of The Court Of Appeals On The *Brady* Claim Is In Conflict With This Court's Decisions

This Court recognized, in *Brady v. Maryland, supra*, that due process is violated where the prosecution

suppresses evidence favorable to an accused, "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady, supra*, 373 U.S. at 87. Since *Brady*, this Court has addressed the government's *Brady* disclosure requirements and the effect of nondisclosure on a fair trial. As recognized in *Agurs*, "[t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt." *Agurs, supra*, 427 at U.S. 112. This Court in *Bagley* recognized that suppressed evidence is material if there is a reasonable probability of a different result had the evidence been disclosed. *Bagley, supra*, 473 U.S. at 682. A "reasonable probability" is present when the cumulative effect of the suppressed evidence could be taken to put the whole case in a different light so as to undermine confidence in the verdict. *Kyles, supra*, 514 U.S. at 434-37; *Bagley, supra*, 473 U.S. at 682. The *Brady* disclosure requirements of *Brady, Bagley, Agurs* and *Kyles* are intended to protect a defendant's right to a fair trial.

The government here conceded it did not disclose the Independence, Iowa, burn tests and should have disclosed them. The governmental burn test evidence, and the opinions of government expert DeHaan, were specifically requested, were exculpatory, and were not disclosed, which the district court found. The district court, however, held the burn tests and DeHaan's opinions were not material, and thus found *Brady* was not violated. App., *infra*, 25-27.

Ryan submits the court of appeals and district court misapplied or failed to apply the principles articulated in *Brady, Bagley, Agurs* and *Kyles*, in ruling the undisclosed evidence was not material. Both courts conducted a

wrongly-focused review of the trial evidence, failing to consider properly the cumulative effect of the withheld evidence on the government's and defendant's cases, the impeachment value of the evidence, and the effect of the evidence on punishment.

Neither the court of appeals nor district court mentioned the purpose underlying the standard of *Brady* and its progeny – to ensure justice and a fair trial. As recognized in *Brady*:

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states . . . "The United States wins its point whenever justice is done its citizens in the courts." . . . A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice. . . .

Brady, supra, 373 U.S. at 87-88. In *Kyles,* this court directed:

> [t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, . . . a trial resulting in a verdict worthy of confidence.

Kyles, supra, 514 U.S. at 434.

The seriousness of the nature of the undisclosed suppressed evidence, and the surrounding circumstances, in this case, were not appreciated below. Here, lead state and federal government agents conducted tests that directly contradicted the government's theory. These agents did not disclose the tests and results to the defense, prosecutor, or to Ward, who sponsored the government's trial theory of flammable liquid fire based on floor burn patterns, or to the government's expert, DeHaan. The seemingly purposeful nondisclosure by governmental agents to the prosecutor, government witnesses, and defense, of the tests, allowed the prosecutor to present the theory of a flammable liquid arson fire, premised on appearance of floor burn patterns, although directly contradicted by evidence in the government's possession. Nor were DeHaan's opinions, contrary to the government's theory as to the cause of the floor burn patterns, disclosed to the defense. The impact of this nondisclosure on Ryan's right to a fair trial was never appreciated by the court of appeals or district court. Nor does the fact the prosecutor did not know about the tests excuse the prosecutor from the duty to learn of any favorable evidence known to government agents, and to disclose it if material. *Kyles, supra,* 514 U.S. at 437.

The court of appeals, paraphrasing the legal standard to apply, failed to mention that "a reasonable probability of a different result" does not mean a defendant has to prove he would have been acquitted. Indeed, the court of appeals, in discussing materiality, appeared to apply a different standard, stating that "materiality is not established through the mere possibility that the suppressed evidence might have influenced the jury." App., *infra,* 7.

The court of appeals noted that the materiality determination is not a sufficiency of the evidence test; yet, the court appeared to apply such a test, as did the district court, which is improper under *Kyles*. *Kyles, supra,* 514 U.S. at 434-35. The court of appeals stated that the *Bagley* and *Kyles* materiality principles "do not restrict [their] consideration of the untainted evidence" presented, quoting the Seventh Circuit. The court described this approach as consideration of "what the government's case would have looked like if the defense had had access to the burn tests and had been aware of DeHaan's disagreement with Svenson and Ward." App., *infra,* 7. In fact, a fair consideration of what the case would have looked like must impact upon, and restrict, the consideration of "untainted evidence." This is because the suppressed evidence in this case contradicts, on substantive issues, the "untainted evidence" and because the suppressed evidence would have been extremely damaging as impeachment of the witnesses who presented the "untainted evidence."

The court of appeals failed to analyze properly the impact the undisclosed evidence would have had on the entire trial, thus failing to conduct an analysis of the cumulative effect the undisclosed evidence would have had. *Kyles, supra,* 514 at 436-37. First, the court of appeals did not analyze properly the impact of the undisclosed evidence on the government and its circumstantial case. The court's determination that the suppressed evidence was not material was based largely on its rejection of Ryan's description of the government's case. The government's arson theory was that Ryan poured a liquid accelerant on hardwood floors of the bar, lounge, nautilus and

exercise rooms, and in the sauna, and then ignited the fire. With no actual physical evidence of accelerants, the government's theory relied on deep char floor burn patterns claimed to be evidence of flammable liquids poured on the floors. In discussing materiality, the court of appeals discounted the significance of the floor burn patterns, and their use as proof that a flammable liquid was used to set the fire, focusing on firefighters' descriptions of the fire as sufficient evidence of multiple origins of the fire. App., *infra*, 7-9. In contrast, the district court had found the government "presented a 'largely circumstantial' evidence case at trial[,]" and the government's basic theory had two components – "that the fire had several separate points of origin and that these separate fires were fueled with a flammable liquid poured on the floor." App., *infra*, 20. The court of appeals, however, discounted one of these components – that the burn patterns allegedly were caused by flammable liquid used to start the multiple fires. The court of appeals wholly failed to recognize that the government theory of a multiple origin fire was based primarily on the burn pattern evidence, allegedly due to poured flammable liquid.

The significance of the withheld evidence is that the evidence undermines the government's reliance upon burn patterns as a basis for its theory of a flammable liquid arson fire. The withheld tests on flooring from the fitness center showed that flammable liquids *will not* create such patterns. DeHaan's withheld opinion was that flammable liquids did not and would not create such patterns, and that the sauna fire was not started by flammable liquid pour. The court of appeals failed to

acknowledge that the undisclosed evidence directly contradicted evidence upon which the government relied. On such a central issue at trial, the impeachment value alone of the suppressed evidence would have been material and must undermine confidence in the verdict.

The court of appeals and district court further failed to analyze the cumulative effect of the suppressed evidence by failing to address the impact of the withheld favorable evidence on the defense, in the hands of competent defense counsel, and the effect on the trial of that evidence. Such analysis is required, as the thorough discussion in *Kyles* shows. *Kyles, supra,* 514 U.S. at 441-54. The exculpatory evidence of the government-conducted alcohol burn test on actual fitness center flooring, which test could not result in a deep char burn pattern, would have had a dramatic effect. Its effect would have been even more pronounced by the fact the tests were conducted by the government. This evidence, of the government's own making, was that flammable liquid could not and would not cause deep char floor burn patterns, contrary to the government's theory. The court of appeals failed to appreciate the impact this evidence could have had.

The court of appeals failed to appreciate the unfairness created by the government's failure to respond fully to the *Brady* request, which had the effect of representing that the suppressed evidence did not exist, which was untrue. As recognized in *Bagley,*

> [i]n reliance on [the government's] misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued . . . We agree that the prosecutor's failure to respond fully to a *Brady* request may impair the adversary process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of the value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption.

Bagley, supra, 473 U.S. at 682-83. The court should consider the adverse effect the prosecutor's failure to respond might have had on preparation or presentation of the defendant's case. *Bagley, supra,* 473 U.S. at 683. Here, the court of appeals failed to consider how the misleading government response to the *Brady* request induced the defense to believe no such tests or opinions existed. Had the defense been aware of the alcohol burn test, it may have done its own testing, offered the government tests into evidence, and impeached the government witnesses with that evidence.[23] The defense may have

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[23] The court of appeals suggested the defense's failure to do similar testing somehow indicates the suppressed evidence is not material. App., *infra,* 9 n.3. This suggestion skews the proper analysis. A defendant has no burden to test the government's theory nor to present any evidence. Further, the defendant was not even aware of the government's testing due to the government's suppression of it, and failure to disclose it even when asked by way of a specific request. As the district court found, Ryan had no way of knowing about the tests or expert

used the government's drop-down test evidence to establish its own drop-down and radiant heat theory. Had DeHaan's expert opinion been known, it would have affected the defense's theory, and most likely would have been used for effective cross examination of DeHaan, Ward, Svenson, and the firefighters. *See Bagley, supra*, 473 U.S. at 678.

The court of appeals' treatment of the suppressed evidence, which evidence the district court held was exculpatory, also indicates that the court misapplied the proper legal standard of *Brady*, *Agurs*, *Bagley*, and *Kyles*. The court of appeals' discussion of the suppressed evidence indicates the court did not deem the tests and opinions as that exculpatory. Such suggestion is contrary to the evidence, to the government's admission, and to the district court's finding. Further, in so implying, the court of appeals failed to acknowledge that *Brady* applies to impeachment evidence as well as to exculpatory evidence. *Bagley*, 473 U.S. at 676. The defense would have used the government's floor burn tests, particularly the alcohol burn test that could not burn the flooring so as to create a deep char burn pattern, to impeach Ward and the government's burn pattern theory. DeHaan's opinion, contrary to Ward's and Svenson's, that the deep char burn patterns were not due to flammable liquid, and that the sauna fire was not caused by flammable liquid, would

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opinions. A defendant should not be required to anticipate government testing and favorable results, or to do testing, whether or not, unknown to the defendant, the government has done testing. That the defense did not do testing has nothing to do with the proper materiality analysis.

have been significant impeachment evidence for the defense to use.

Finally, the court of appeals and district court failed to analyze properly the cumulative effect of the suppressed evidence on punishment. Due process requires disclosure of favorable evidence that is material to guilt or to punishment, requiring materiality to be analyzed in terms of the impact the suppressed evidence would have had on punishment, as well as on guilt. *Brady*, 373 U.S. at 87. Neither the court of appeals nor district court mentioned that, at sentencing, the government relied on the theory of flammable liquids being deliberately poured and ignited, where the prosecutor argued Ryan should be given a first degree murder offense level for setting multiple fires with flammable liquids. The district court enhanced Ryan's sentence twenty years based upon the government's flammable liquid arson theory, Ryan's denial that he set the fires, and his denial that he poured accelerants to set the fires. (Sent. Tr. pp. 17-27, 38, 40-1) In view of the government's theory that the fire was set by pouring flammable liquids, and the district court's acknowledgement of this theory in sentencing Ryan, the materiality of the suppressed evidence also should have been analyzed regarding punishment.

The Supreme Court has imposed the stringent requirements on the government in *Brady*, *Agurs*, *Bagley*, and *Kyles*, to disclose material, favorable evidence, in order to ensure a fair trial, so as to provide justice and due process. The courts of appeal should not be allowed to avoid the dictates of *Brady* and its progeny by applying an abuse of discretion standard of review to *Brady* determinations, or by misapplying the correct standard in

evaluating materiality of undisclosed favorable evidence. The Eighth Circuit, by applying an abuse of discretion standard and misapplying the proper *Brady* standard, affirmed the denial of a new trial, and thus denial of a fair trial and due process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-3970

United States of America, *
*
Appellee, * Appeal from the United
* States District Court for
v. * the Southern District of
* Iowa.
Dale Lynn Ryan, *
*
Appellant. *

Submitted: April 16, 1998

Filed: August 20, 1998

Before WOLLMAN, BEAM, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

WOLLMAN, Circuit Judge.

Dale Lynn Ryan appeals from the district court's[1] denial of his motion for a new trial. We affirm.

I.

On January 1, 1990, the Ryan Fun and Fitness Center (the Center) in West Burlington, Iowa, was destroyed in a fire. Two members of the West Burlington Volunteer Fire

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[1] The Honorable Harold D. Vietor, United States District Judge for the Southern District of Iowa.

Department were killed while fighting the fire. After an extensive investigation by federal, state, and local authorities, Ryan, who was the manager of the Center, was charged with arson. *See* 18 U.S.C. § 844(i). After a lengthy jury trial, he was convicted and sentenced to a 328 month term of imprisonment. Ryan appealed, and a divided panel of this court affirmed his conviction. *See United States v. Ryan*, 9 F.3d 660, 662 (8th Cir. 1993) (*Ryan I*). We granted rehearing en banc and vacated the panel opinion. Upon rehearing, we affirmed Ryan's conviction and reinstated the panel opinion as to the other issues that were not considered en banc. *See United States v. Ryan*, 41 F.3d 361, 362 (8th Cir. 1995) (*Ryan II*).

On October 30, 1996, Ryan filed a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure based on newly discovered evidence. He raised three arguments in the motion: (1) that the government had withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (2) that newly discovered scientific evidence warranted a new trial; and (3) that his conviction was the product of perjured or false testimony. For a detailed summary of the facts underlying Ryan's conviction and a description of the government's case, *see Ryan I*, 9 F.3d at 662-64. We will limit our discussion to the facts relevant to this appeal.

On January 2, 1990, the morning after the fire, Carl Svenson and Richard Ward, special agents for the Iowa Fire Marshal's Office, began their investigation. The investigation eventually grew to include numerous local and federal agencies. Early on, Svenson and Ward formed the opinion that arson was the probable cause of the fire.

They suspected that a flammable liquid, or liquid accelerant, had been used to start the fire at various points in the building. This conclusion was based on a variety of factors, including the presence of several deep, charred burn patterns at various locations on the Center's hardwood floors.

In March of 1990, while the ruins were being razed, Svenson removed a large sample of undamaged flooring from one of the Center's racquetball courts and took it to the West Burlington fire station. In January of 1991, Ryan's attorneys and fire analysis expert were shown physical evidence that had been gathered and stored in West Burlington, including this flooring sample.

As its investigation continued, the government became aware that Ryan's planned defense was that the fire had been accidental and that its rapid spread throughout the building was the product of what is known as a "flashover." A flashover occurs when a fire in an area produces sufficient heat to explosively ignite all of the combustible material within the area. The government also discovered that the defense was planning to prove that the deep charring patterns were caused by burning materials falling from overhead structures, an occurrence known as "drop-down."

In July of 1991, approximately two months before Ryan's trial, Svenson took the floor samples to a firefighter training session at a state training facility in Independence, Iowa. Svenson invited Chris Van Fleet, the lead agent in the federal government's investigation, and Donald Peterson, a photographer, to witness tests he had

planned for the floor samples.[2] At the session, Svenson unsuccessfully tested the defense's flashover theory. After he was unable to induce a flashover, he poured alcohol on the sample and ignited it. The fuel burned off, but left no deep charring in the sample. Svenson then put alcohol and other combustible materials, including pieces of a wall, on a piece of the floor sample and ignited it. This test resulted in deep charring similar to the patterns found at the fire scene. The government had no knowledge of these tests, and thus neither the fact nor the results of the tests were revealed to the defense before the trial.

One of the government's expert witnesses, John Dehaan, a criminalist for the California Department of Justice, testified at trial that the fire had multiple origins and that an accelerant had been used. Before the trial, however, he had expressed some disagreement with Svenson and Ward's theory regarding the cause of the deep charring on the hardwood floors. While Svenson and Ward theorized that the patterns resulted from a poured flammable liquid, Dehaan was of the opinion that not all of the patterns could be attributed exclusively to a flammable liquid. He identified the defense's drop-down theory as a possible cause for some of the patterns. His

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[2] Although the government characterizes the tests as an "ad hoc" experiment run during a firefighter training session, we attach more significance to the demonstration. Svenson, with knowledge of the defense's theory, invited a federal investigator and a photographer to accompany him to a site that was more than 120 miles from West Burlington. We agree with the district court that the tests were conducted, at least in part, because of the Ryan investigation.

difference of opinion with Svenson and Ward was not disclosed to the defense.

The government's case focused on evidence suggesting that the fire originated in as many as seven areas of the building. One of those areas, the Center's sauna, contained a large wooden floor grate. This grate's post-fire condition revealed that although it had been badly charred on its topside, the underside of the grate was only slightly charred. Although defense counsel did not view the grate prior to the trial, they knew that it had survived the fire and that they could have examined it upon request.

On August 23, 1991, Ryan filed a "Production/Brady Request" seeking production of, *inter alia*, tests, reports, evidence regarding burn patterns, and any differing opinions of government experts. Ryan contends that the government's failure to disclose the burn tests, Dehaan's full opinion, the sauna grate, and other fire debris were covered by this request.

II.

We review a district court's denial of a motion for new trial based on newly discovered evidence for abuse of discretion. *See United States v. Hiveley*, 61 F.3d 1358, 1361 (8th Cir. 1995) (per curiam); *United States v. Costanzo*, 4 F.3d 658, 667 (8th Cir. 1993). This standard also applies where, as here, a defendant seeks a new trial premised upon a *Brady* claim. *See United States v. Stuart*, No. 97-1671, slip op. at 3 (8th Cir. 1998); *United States v. Kern*, 12 F.3d 122, 126 (8th Cir. 1993); *United States v. Williams*,

81 F.3d 1434, 1437 (7th Cir. 1996). This deferential standard of review is especially appropriate in the context of a lengthy, hard-fought, highly charged case like the present one. As the Seventh Circuit observed in *Williams*:

> Having watched the jury as they listened to the testimony, having listened to the testimony and the arguments himself, having his finger as it were on the pulse of the trial – a trial that occupied 28 days scattered over four months – the district judge was in a better position than we to weigh the imponderables involved in a judgment of prejudice.

81 F.3d at 1440.

A.

In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. To establish a *Brady* violation, Ryan must demonstrate that the government suppressed evidence, that the evidence was exculpatory, and that the evidence was material either to guilt or punishment. *See United States v. Duke*, 50 F.3d 571, 577 (8th Cir. 1995). Evidence is material under *Brady* " 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)). "A reasonable probability is a

probability sufficient to undermine confidence in the outcome." *Clemmons v. Delo*, 124 F.3d 944, 949 (8th Cir. 1997) (citing *Bagley*, 473 U.S. at 682). However, materiality is not established through the mere possibility that the suppressed evidence might have influenced the jury. *See Knox v. Iowa*, 131 F.3d 1278, 1283 (8th Cir. 1997).

The district court concluded, and the government appears to concede, that both the burn tests and Dehaan's disagreement with other government experts were both exculpatory and unavailable to Ryan. The question becomes, then, whether the evidence was material under *Bagley* and *Kyles*. It is important to remember that a materiality determination is not a sufficiency of evidence test. *See Kyles*, 514 U.S. at 434. It follows that once a constitutional error is found, we need not continue with a harmless-error review. *See id.* at 435. These principles, however, do not restrict our consideration of the untainted evidence that was presented to the jury. "Although it is not enough that the untainted evidence be sufficient for conviction, that evidence must not be ignored in the making of the determination whether there is a reasonable likelihood that the outcome would have been different had the government not misbehaved." *Williams*, 81 F.3d at 1438 (citations omitted). In other words, we must consider what the government's case would have looked like if the defense had had access to the burn tests and had been aware of Dehaan's disagreement with Svenson and Ward.

Ryan contends that the cause of the floor burn patterns was vital to the government's case: "Without multiple pools of liquid accelerant, as posited by the Government at trial, there was no evidence of multiple or

separate, simultaneous fires. The only way the government tried to prove these multiple pools of accelerants was the floor burn patterns." Reply Brief for Appellant at 6. Our review of the record reveals a different depiction of the government's case. In order to convict Ryan, the government had to prove beyond a reasonable doubt that he "maliciously [damaged or destroyed] . . . by means of fire or an explosive, any building, vehicle or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i). We conclude that the presence of the floor burn patterns was merely a small part of the government's effort to meet this burden.

Some of the government's strongest evidence came from several firefighters who testified about their experiences battling the flames. They recounted observing two distinct and separate glowing areas on the roof approximately 50 feet apart, low bluish flames in one room that would rekindle when doused with water, fires that required inordinate amounts of water to extinguish, only to reignite, and an isolated interior fire within the Center's sauna. The firefighters' testimony contained no references to the hardwood floor burn marks. Moreover, government experts testified regarding numerous clues that pointed to arson, including post-fire observations of several hot spots, burn patterns on walls that appeared to burn in a downward direction, carpet burns that were consistent with the use of a flammable liquid, and a post-fire analysis of the Center's structure that suggested a multiple-origin fire. The presence of the hardwood floor

burn patterns, then, was only a small part of the government's well-supported theory that the fire was intentionally set.[3]

We also note the limited exculpatory value of both the burn tests and Dehaan's disagreement with other government experts. From the standpoint of controlled testing conditions, Svenson's burn tests were performed under less-than-ideal circumstances. Additionally, Svenson was unable to produce a flashover, the defense's theory for the rapid spread of fire. Likewise, Dehaan's initial misgivings about the cause of the burn patterns were adequately presented at trial. During vigorous cross-examination by Ryan's counsel, Dehaan, although adhering to his opinion that an accelerant was used to start the fire, admitted that some of the burn patterns could have resulted from drop-down.

In light of the foregoing record, we conclude that the *Brady* evidence would have had a negligible impact on the jury's decision. Thus, it is not reasonably probable that the evidence would have changed the outcome had it been disclosed. The district court therefore did not abuse its discretion in denying a new trial on this issue. *See Kern*, 12 F.3d at 126.

Ryan also argues that the government suppressed exculpatory evidence by inadequately informing him that the sauna grate and other fire debris samples were in the government's possession. We disagree. The record fully

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[3] We also observe that although Ryan strenuously asserts that the floor burn patterns were a key ingredient to the government's case, he undertook no burn testing of his own.

supports the district court's finding that the sauna floor grate and the fire debris samples were not suppressed. The defense was notified of their existence and that the items were available for inspection and testing.

Ryan's remaining *Brady* arguments lack merit and do not warrant further discussion. Accordingly, we hold that the district court did not abuse its discretion when it refused to grant Ryan a new trial based on the alleged *Brady* violations.

B.

Ryan asserts that the district court erroneously denied his motion for a new trial based on new scientific evidence. His proffered scientific evidence, purportedly based upon new scientific principles, techniques, and technology, included burn tests and computer modeling performed by his retained experts, as well as burn tests performed by government fire protection agencies.

There are five prerequisites to the grant of a new trial on the ground of newly discovered evidence: (1) the evidence must have been discovered after the trial; (2) the failure to discover must not be attributable to a lack of due diligence on the part of the movant; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material; and (5) the evidence must be likely to produce an acquittal if a new trial is granted. *See United States v. Duke*, 50 F.3d 571, 576-77 (8th Cir. 1995).

Ryan contends that the burn tests, which he maintains are based on new technology, disprove the government's theories of arson. We are not convinced, however,

that the tests satisfy the first prong of the newly discovered evidence inquiry. Ryan, who was afforded an adequate opportunity to conduct these types of tests prior to his trial, now seeks to retry his case in his motion for a new trial. His motion is premised, not on the existence of newly discovered evidence, but on the possibility that such evidence would have been revealed had he undertaken similar testing prior to his trial. This is an inadequate basis for the grant of a new trial.

Ryan also argues that computer modeling of the fire, technology purportedly unavailable at the time of trial, is newly discovered evidence that would likely produce an acquittal. We find his argument to be unpersuasive for a number of reasons. First, it is unlikely that sophisticated computer modeling was unavailable in 1991. At the hearing on the motion for new trial, Fred Fisher, Ryan's fire expert, testified that only through recent advances in personal computer capabilities has this type of modeling been made available. On cross-examination, however, Fisher admitted that modeling may have been possible on larger computers at the time of trial. Second, computer modeling is only as reliable as the raw data that are entered into the modeling program. The government's cross-examination of Fisher exposed a number of weaknesses in the assumptions he made prior to modeling the fire. Finally, we conclude that the record before us does not warrant characterizing a computer fire model as newly discovered evidence. Both the raw data and the controlling scientific principles of the fire were available before trial. Absent a more detailed explanation of technological issues involved, we are unwilling to conclude that the processing of the data via a computer algorithm

constitutes newly discovered evidence. The computer technology is not itself newly discovered evidence, but rather creates a method to present evidence – evidence that was available prior to Ryan's trial. Accordingly, we hold that the district court did not abuse its discretion in denying Ryan's motion for a new trial based on newly discovered evidence.

C.

Finally, Ryan argues that his conviction was the product of the government's use of perjured testimony. We conclude that his arguments lack merit and warrant little discussion. Although Ryan asserts that the trial testimony of Larry Garmoe, a West Burlington police officer who assisted in the investigation of the case, was false, we have no basis upon which to conclude that Garmoe's testimony, though inconsistent with the recollections of a number of his fellow investigators, rose to the level of perjury. *See United States v. Martin*, 59 F.3d 767, 770 (8th Cir. 1995) ("A challenge to evidence through another witness or prior inconsistent statements is insufficient to establish prosecutorial use of false testimony"); *United States v. White*, 724 F.2d 714, 717 (8th Cir. 1984) (per curiam). Similarly, we conclude that Ryan's remaining false-testimony arguments fail to demonstrate perjury on the part of government witnesses.

The judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,	*	CRIMINAL NO. 91-71
Plaintiff,	*	**MEMORANDUM OPINION AND RULING DENYING MOTION FOR NEW TRIAL**
v.	*	
DALE LYNN RYAN,	*	(Filed 97 Oct -2)
Defendant.	*	

On January 1, 1990, a fire destroyed the Ryan Fun & Fitness Center (the fitness center) in West Burlington, Iowa. Two firefighters died fighting the fire. On July 15, 1991, defendant Dale Lynn Ryan, who was the manager of the fitness center, was indicted for the crime of arson in violation of 18 U.S.C. § 844(i). Trial commenced September 3, 1991, and concluded with a guilty verdict on September 25, 1991. By special verdicts, the jury found that defendant's conduct of setting the fire resulted in the deaths of the two firefighters. On February 6, 1992, I sentenced defendant to imprisonment for a term of 328 months. Ryan appealed and his conviction was affirmed by a divided panel of the United States Court of Appeals for the Eighth Circuit, *United States v. Ryan*, 9 F.3d 660 (8th Cir. 1993). Rehearing en banc was granted and the panel opinion was vacated. The en banc court then affirmed the conviction, 6-5, and reinstated the panel opinion as to issues other than those considered en banc that had been raised in Ryan's initial appeal. *United States*

v. Ryan, 41 F.3d 361 (8th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995).[1]

On October 30, 1996, Ryan filed a motion for new trial. After extensive prehearing proceedings and rulings on various issues, an evidentiary hearing was held on the 20th, 21st, 22nd and 27th days of May, 1997. Exhaustive post-trial briefs have now been submitted.

GROUNDS FOR MOTION

Ryan asserts entitlement to a new trial based on his claims of:

(1) Newly discovered evidence that the government suppressed favorable material evidence;

(2) Newly discovered scientific evidence; and

(3) Government use of perjured testimony.

SUPPRESSION OF EVIDENCE

Defendant contends that favorable material evidence was suppressed by the government, and that this suppression requires a new trial under the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Specifically, defendant complains of the government's failure to disclose to defendant before trial:

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[1] The issues on appeal were different from those involved in defendant's current motion for new trial. The primary issue, the one that divided the court of appeals, related to this court's jury instruction about the fitness center's use in an activity affecting interstate commerce.

(1) the fact that a burn test of flooring from the fitness center was conducted by government investigators and the results thereof, which defendant contends were favorable to the defense;

(2) the fact that one government expert witness held opinions contrary to the government's theory that deep charred burn patterns were the result of use of flammable liquids;

(3) evidence of the condition of a floor grate that was in the fitness center's sauna, one of the places of origin of the fire under the government's theory;

(4) fire debris samples with evidence of melted plastic; and

(5) evidence that there was another suspect.

Facts

The evidence adduced at the trial in 1991 is summarized in the circuit court panel's opinion, *Ryan*, 9 F.3d at 662-64, which I incorporate by reference herein. A copy is attached hereto as Appendix A. The following facts include those adduced in the motion for new trial hearing.

Immediately after the fire, which occurred the evening of January 1, 1990, an investigation into the fire began. Carl Svenson and Richard Ward, special agents for the Iowa Fire Marshal's Office, began the investigation with the West Burlington Fire Department and the West Burlington Police Department. Investigators were expanded to include state of Iowa criminal investigators

and Chris Van Fleet, a federal Alcohol, Tobacco and Firearms special agent, who became the agent in charge of the federal prosecution that ensued. Svenson and Ward soon formed an opinion that there were several points of origin of the fire, that a flammable liquid had been used to start a fire at each point of origin, and that it was arson. Their opinion that a flammable liquid had been used to start the fires at the several points of origin rested in part on their opinion that several patterns of deep charred burning at various places on the fitness center's floor indicated that a flammable liquid had been poured on those places and ignited. (Various samples were taken and tested in a laboratory for the presence of flammable liquid and the tests were negative. There was expert testimony at the trial that a long burning fire will often consume all of the flammable liquid, precluding detection of it in later lab tests.)

In March of 1990 Svenson removed a large sample of undamaged flooring from the fitness's center's south raquetball [sic] court and took it to the West Burlington fire station. He took it for testing. As noted *infra*, later this flooring sample was divided into two segments, one of which is Exhibit 1M and the other of which is Exhibit 1N. (This flooring sample before it was divided will be referred to as Exhibit 1M/1N.) In January of 1991 defendant's attorneys (he had retained counsel within a few days of the fire) and his retained fire analysis expert were shown physical evidence that had been accumulated and stored in West Burlington, including Exhibit 1M/1N.

In the course of the investigation the government learned that it was the theory of Ryan or his representatives that the fire was accidentally caused and that the

spread of the fire to various parts of the fitness center was caused by "flashover" – a form of radiant heat that causes the combustible materials in the area to which the flashover reaches to ignite, and the defense theory that the deep charred burning was caused by burning materials from above dropping down onto the floor. (Svenson and Ward never disputed that many areas of deep charred burning were caused by such drop-down; they opined, however, that some areas of deep charred burning were caused by liquid fuel.)

In July of 1991, Svenson transported Exhibit 1M/1N to a building on the grounds of the Mental Health Institute at Independence, Iowa (approximately 135 miles from West Burlington, Iowa, according to the Iowa Department of Transportation road map), for the purpose of conducting tests. The fire marshal's office maintains a three story building at the Mental Health Institute as a training center for fire departments in which fires are set for training purposes. The building doesn't burn down in these events because it has cement floors and walls. On July 8 tests were conducted by Svenson. Two other individuals from the state fire marshal's office were present. Also present was a photographer, Donald Peterson, and ATF Agent Chris Van Fleet, who Svenson had specifically invited to attend. What occurred has variously been described as a "training session," "experiments," and "tests." Whatever else it may have been, it was a test and will hereafter be referred to as that. The test was at least partly done because of the Ryan investigation, and that is why Van Fleet was invited. Before the tests were conducted, Exhibit 1M/1N was divided in two, resulting in Exhibit 1M and Exhibit 1N. A test was conducted in an

effort to get "flashover" ignition of the flooring but it did not ignite. Another test was conducted by pouring a liquid accelerant, denatured alcohol, on Exhibit 1N and igniting it. The fuel burned off but did not leave any deep charring. Another test was conducted putting alcohol and other combustible materials, including samples of the raquetball [sic] wall, on Exhibit 1M and igniting it. This test resulted in deep charring. Peterson took still photos but his efforts to videotape were unsuccessful. He turned the photos and negatives over to Svenson. Nobody has been able to find them, so they are not available to us.

At the time the Independence tests were conducted, Svenson and Van Fleet knew that the federal grand jury was investigating the fire. Indeed, just one week after the tests, on July 15, the grand jury indicted Ryan.

On August 23 Ryan filed a "Production/*Brady* Request" seeking production of, *inter alia*, "all tests and reports * * * not already produced," "any evidence which would support or reject the opinions of Defendant's experts including how a burn pattern misdiagnosis could lead one to the conclusion that accelerants were used," and "state who and in what detail the federal experts or independent experts reviewed the evidence and to what extent their conclusions agreed or differed with each other, and if they differed who differed and where are the opinions to that effect."

At no time before trial did the government reveal to the defendant the Independence tests, and defendant and his representatives had no knowledge of the tests and could not, with reasonable diligence, have known of the tests. Neither Svenson nor Van Fleet revealed the tests to

the prosecutor, Assistant United States Attorney Linda Reade (now a Judge of the Iowa District Court), and she had no knowledge of the tests. She testified at the new trial hearing that if she had known of the tests, she would have revealed them to the defense.

One of the government expert witnesses at the trial was John DeHaan, a criminalist for the California Department of Justice. He opined at the trial, and he still believes, that the fire had multiple origins, and that a flammable liquid was used. Before the trial, however, he did express to Svenson and Ward his disagreement with their theory that some of the deep charring patterns were caused by the flammable liquid. His difference of opinion with Svenson and Ward on that point was not disclosed to the defense.

A grate that was on the floor of the sauna, which the government contended was one of the points of origin of the fire, contains charring on the top side but not the underside. (Defendant contends that this evidence tends to refute the government's theory that one point of origin was the sauna.) The defense lawyers did not see the grate before the trial, but the defense was notified of its existence, where it was, and they could have examined it if they had wished.

The defense lawyers also knew of the existence of samples of fire debris. They did not examine these samples, but they could have done so.

The defense was not advised that the investigators had a "lead" to a person named Robert Rose, who had a prior arson conviction.

The government presented a "largely circumstantial" evidence case at trial. *See Ryan*, 9 F.3d at 673. The basic theory of the government was that the fire had several separate points of origin and that these separate fires were fueled with a flammable liquid poured on the floor. In support of that theory they produced much evidence, only a small portion of which was opinion testimony that some deep charred burn patterns were caused by the flammable liquid. More details about the government's and defendant's theories of the cause of the fire are recited in Appendix A.

The jurors started their deliberations shortly after 2:00 p.m. on Monday, September 23, and returned their guilty verdict on Wednesday, the 25th, at 11:00 a.m.

Long after the trial and the appeal, the defense learned of the Independence tests and the other matters they assert as the basis for a new trial under the *Brady* doctrine.

Brady and Its Progeny

In *Brady* the Court held: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. In *United States v. Agurs*, 427 U.S. 97 (1976), the Court held that the government's duty to disclose exculpatory evidence is not limited to cases in which the defense requests such evidence. In *Agurs* the Court also explained: "A fair analysis of the holding in

Brady indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *Id.* at 104.

In *United States v. Bagley*, 473 U.S. 667, 682 (1985), the Court further articulated the materiality requirement: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." This standard is more favorable to the defendant than the standard governing newly discovered evidence generally, a standard that requires, *inter alia*, that the newly discovered evidence "must be likely to produce an acquittal if a new trial is granted." *See United States v. Duke*, 50 F.3d 571, 576-77 (8th Cir. 1995).

The Supreme Court shed additional clarifying light on *Brady* and *Bagley* in *Kyles v. Whitley*, ___ U.S. ___, 115 S. Ct. 1555 (1995). The Court observed that in *Bagley*:

> [T]he Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes, and it abandoned the distinction between the second and third *Agurs* circumstances, *i.e.*, the "specific-request" and "general- or no-request" situations. *Bagley* held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

Kyles at 1565. The Court went on to emphasize four aspects of materiality under *Bagley*. The first aspect is:

> Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's aquittal [sic] * * * .

Id. at 1565-66. Articulating the second aspect, the Court said:

> The second aspect of *Bagley* materiality bearing emphasis here is that it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. [Footnote omitted.]

Id. at 1566. The third aspect is that:

> [O]nce a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review. Assuming *arguendo* that a harmless error enquiry were to apply, a *Bagley* error could not be treated as harmless, since "a reasonable probability that,

> had the evidence been disclosed to the defense, the result of the proceeding would have been different," 473 U.S., at 682, 105 S.Ct., at 3383 (opinion of Blackmun, J.); *id.*, at 685, 105 S.Ct., at 3385 (White, J., concurring in part and concurring in judgment), necessarily entails the conclusion that the suppression must have had " 'substantial and injurious effect or influence in determining the jury's verdict,' " *Brecht v. Abrahamson*, 507 U.S. ___, ___, 113 S.Ct. 1710, 1712, 123 L.Ed.2d 353 (1993), quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946).

Id. Finally, the Court observed:

> The fourth and final aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item-by-item. [Footnote omitted.]

Id. at 1567.

A final point is made in *Kyles* that is relevant to Ryan's motion: "[Tlhe individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* at 1567.

Conclusions

To win a new trial under *Brady* and its progeny, Ryan must show that: "(1) the government possessed evidence, including impeachment evidence, favorable to the defense; (2) [Ryan] did not possess the evidence nor could have obtained it with reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4)

had the evidence been disclosed to the defense, a reasonable probability exists that the trial outcome would have been different, i.e., the evidence was material." *United States v. Arnold*, 117 F.3d 1308, 1315 (11th Cir. 1997). The law concerning the issue of materiality is thoroughly canvassed, *supra*, under the portion of this memorandum opinion entitled "*Brady* and Its Progeny."

The investigators' lead on Robert Rose is not evidence favorable to the defense. There is no showing that the lead ever ripened into Rose becoming a suspect, and there simply was no evidence linking Rose to the fire.

The sauna floor grate and the fire debris samples with evidence of melted plastic were not suppressed. Their existence was made known to the defense and the defense could have examined those items.

Most troublesome are the Independence tests coupled with DeHaan's disagreement with Svenson and Ward about some deep charring patterns being caused by flammable liquid. The government concedes that the Independence tests should have been revealed to the defense before trial. I agree. It is evidence that the government possessed and it has aspects favorable to the defense, particularly the fact that burning liquid fuel alone did not produce a deep charring effect on the floor sample. (Evidence of deep charring achieved at Independence by adding combustible materials is not particularly significant because it was not in dispute at the trial that deep charring could result from burning materials falling down on the floor.) Defendant did not possess that evidence and had no way of obtaining it with reasonable diligence. The prosecution did not produce this evidence.

Thus, the first three requisites that Ryan must show are established. The first three requisites are also met in respect to DeHaan's opinion. The remaining issue is whether, had this evidence been disclosed to the defense, a reasonable probability exists that the trial outcome would have been different. In other words, were the Independence test evidence and DeHaan's opinion, considered collectively, material?

Thorough and careful consideration of the trial evidence and the evidence produced in connection with the motion for new trial lead me to answer the preceding question "No." My confidence in the jury's guilty verdict is not undermined, and I do not believe any other neutral observer's confidence in the verdict would be undermined. The Svenson-Ward theory that some deep charring was caused by a flammable liquid was merely a small part of a lot of evidence pointing to a multiple origin fire. The Independence tests results and DeHaan's disagreement with Ward and Svenson about the cause of deep charring could have cast some doubt on the validity of Ward and Svenson's opinion that the cause of some deep charring was liquid accelerant, but that would not have undercut the abundance of other evidence that supported the government's multi-origin arson fire theory. Most of that other evidence is recited in Appendix A. The deep charring theory is not even mentioned in Appendix A, and it was alluded to only once in the prosecutor's final argument to the jury (Trial Transcript, Volume XV, page 25, beginning at line 8), and not at all in her rebuttal argument. Observations made by the firefighters about the behavior and characteristics of the fire (detailed in Appendix A), opinion testimony, including DeHaan's,

that the fire had multiple origins fueled by flammable liquid, and evidence of burn patterns are among the many compelling items of evidence indicating an arson fire of multiple origins. Of great importance were numerous observations of the firefighters, and that is the evidence that was stressed most strongly by the prosecutor in submitting the case to the jury. Additional circumstantial evidence that the fire was arson consists of defendant Ryan's own conduct and statements, both before and after the fire. (Defendant contends that this evidence could not be considered by the jury in determining whether the fire was arson; rather, it could be considered only in determining whether Ryan was the arsonist after first determining from other evidence that the fire was arson. Defendant's position is not correct. While probably insufficient in itself to prove that the fire was arson, evidence of Ryan's statements and conduct was relevant evidence that the jury could properly consider together with other evidence in determining whether the fire was arson.)

In sum, the Independence tests and DeHaan's disagreement with Svenson and Ward about the meaning of some deep charring would not, in my judgment, have made a difference. The impact of that evidence on the jury would have been minimal – far, far less than, for instance, the impact of the suppressed evidence in a recent Eighth Circuit case, *Clemmons v. Delo*, No. 96-1086, 1997 WL 528227 (8th Cir. Aug. 28, 1997) (a murder case in which the suppressed evidence was a statement made by an eyewitness shortly after the killing that he thought one of the two assailants was Fred Bagby, the very person the defense contended had committed the murder).

Defendant has not established entitlement to a new trial on the basis of suppressed evidence.

NEWLY DISCOVERED SCIENTIFIC EVIDENCE

Defendant contends that "[n]ew scientific evidence, discovered since trial, establishes conclusively that the fire could not happen as the Government claimed; The fire was not arson, was not caused by use of flammable liquids, and did not have multiple origins." Defendant's Post-Hearing Brief in Support of Motion for New Trial, at p.26. Defendant contends that in a new trial the new evidence would probably produce an aquittal. [sic]

When newly discovered evidence is advanced as a ground for a new trial, "the district court must apply a substantive standard that includes five prerequisites: (1) the evidence must have been discovered after the trial; (2) the failure to discover the evidence must not be attributable to a lack of diligence on the part of the petitioner; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material; and (5) the evidence must be likely to produce an acquittal if a new trial is granted. [Citation omitted.]" *United States v. Duke*, 50 F.3d 571, 576-77 (8th Cir. 1995).

The evidence claimed by defendant to be newly discovered is computer modeling using methods and technology not available at the time of trial, and burn pattern studies using data and techniques developed since the time of the trial. Perhaps it is more accurate to say that the newly discovered evidence would be expert opinion testimony based on the foregoing. Defendant contends this evidence would demonstrate that the government's

theory of the fire is unsupportable, and that it is probable that the fire had only one origin, on the second floor of the northwest corner of the building.

I think there is some question whether this evidence constitutes "newly discovered evidence." Newly discovered evidence must pertain to *facts* in existence at the time of the trial. *See Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990); *United States v. Bransen*, 142 F.2d 232, 235 (9th Cir. 1944); *United States v. DePugh*, 266 F. Supp. 417, 434 (W.D. Mo. 1967). It is not clear to me that defendant is asserting newly discovered *facts* that existed at the time of the trial; rather, he appears to be asserting new expert opinion testimony that the fire did not have multiple origins based on recently developed techniques of analysis. Defendant cites DNA cases. I believe that those cases are distinguishable because the evidence in question, the DNA of the defendant and the DNA of the assailant, are *facts* that existed at the time of the trial, although those facts were not discovered nor discoverable until after trial when the scientific means of identifying DNA was developed.

In any event, assuming that defendant's proffered new evidence does qualify as newly discovered evidence, it is merely cumulative and impeaching. Defendant's evidence at the trial, including expert opinion testimony, was to the effect that the fire did not have several separate origins, that the burn patterns were not indicative of use of a liquid accelerant, and that the fire had one place of origin and was caused by accident. Defendant's new evidence is more of the same.

Finally, the new evidence, which would merely be a part of extensive factual and opinion evidence, factual and opinion, on the issue of whether the fire was arson, would not, in my opinion, be likely to produce an acquittal.

Defendant has not established entitlement to a new trial on the basis of newly discovered evidence.

ALLEGED PERJURED TESTIMONY

I find and conclude that Ryan has failed to establish his perjury contentions, and in my opinion this issue does not merit further comment. He has not established entitlement to a new trial on this ground.

RULING

Defendant Dale Lynn Ryan's Motion for new trial is **DENIED.**

DATED this 2nd day of October, 1997.

/s/ Harold D. Vietor
HAROLD D. VIETOR
Senior U.S. District Judge

APPENDIX A

* * *

On January 1, 1990, a fire destroyed the Ryan Fun and Fitness Center ("the Center") in West Burlington,

Iowa. The Center, recently closed due to financial difficulties, was managed by appellant Dale Ryan, and owned by Ryan's father, a successful Kansas businessman. (Ryan's father had previously backed Ryan in two failed business ventures.) Ryan assumed management of the center in January of 1989 and immediately began a major remodeling effort. The ensuing year was fraught with difficulties, financial and familial, and Ryan soon lost his enthusiasm for the Center, while his relationship with his father became increasingly strained. Ryan stated on several occasions that he wished the Center would burn down. Ryan also expressed concern on several occasions that his father did not hold him in high regard because of his failures.

On December 6, 1989, Ryan's father directed that the Center be closed. Ryan had the locks changed, retaining the only two keys in his possession. (He did not replace the key in the exterior box, to be accessed by the fire department in an emergency.) Ryan then began efforts to sell the Center. On December 15, Ryan took a complete photographic record of the Center. On December 26, he removed his personal property, and some property belonging to the Center, ostensibly in an effort to ready the Center for sale. (Ryan later made a false claim for insurance coverage on the property belonging to the Center, claiming that it was lost in the fire.) On December 20, Ryan requested that U.S. West disconnect the Center's dedicated fire alarm line, as well as the regular phone line. Ryan believed that the lines would be disconnected

immediately. In fact, the regular phone line was disconnected on December 21 and the dedicated line disconnected on December 28. Between December 20 and December 28, five trouble signals from the center (caused by interruption in the electrical current or the dedicated phone line) were received at the West Burlington law enforcement center. In each instance, the alarm was reset at the center's fire alarm panel, generally within a few minutes. On December 29, Ryan called U.S. West to verify the disconnection of the dedicated line.

On December 29, at approximately 2:00 a.m., West Burlington police officer Larry Garmoe made a routine check of the Center. In the parking lot, he noticed a car loaded with containers, including floor solvents, motor oil, and linseed oil. Officer Garmoe could not identify the labels of several additional containers located in the back seat. Ryan received a ticket in November, 1989 while driving a car with the same license number. Officer Garmoe testified that he saw Ryan driving a car with the same license number on January 10, 1990. (While the license number was never in dispute, Officer Garmoe did note on the night of December 29, that the car which he observed was a blue Ford Fairmont. In fact, the car was a white Mercury Zephyr, owned by Ryan's father.)

On December 30 and 31, Ryan was distraught and depressed, apparently over a disagreement with his girlfriend. In late December, 1989, Ryan made serious inquiries about the purchase of a bar in Gulf Port, Illinois, indicating that money was no problem. On January 2, 1990, Ryan again spoke with the owner of the bar about the purchase, but failed to mention the fire at the Center.

The fire at the Center was discovered at approximately 8:30 p.m. on January 1, 1990. Firefighters later testified that, upon their arrival at the Center, all doors were locked and there were no signs of forcible entry. Firefighters further testified that they observed unusual fire behavior during the firefighting and rescue effort, similar, in their experience, to other fires which had been fueled by flammable liquids. Two distinct and separate red hot areas, approximately 50 feet apart, glowed on the roof; low bluish-colored flames which rekindled quickly when blackened with water danced on the floor; an intense wall of fire which did not respond to water swept across the lounge area; an isolated, interior fire confined to the sauna rekindled quickly when doused with substantial quantities of water; an unusual fire in the wall of the weight room also rekindled after being blackened with water. Firefighters Wilt and Klein were the first firefighters to enter the Center and were discovered missing ten to fifteen minutes later. Apparently having left their hoses in panic, in response to the wall of fire in the lounge, the bodies of the two men were discovered approximately three hours later in the DJ booth of the lounge area.

Ryan arrived at the fire scene shortly after the fire started. Firefighters later testified that Ryan, initially in a quiet mood, began making inquiries about the origin of the fire, and stated that he hoped they did not think it was arson. Ryan became very agitated when he learned that two firefighters were missing. Approximately four to five days later, Ryan wrote to his girlfriend, stating that he did not start any "fires" at the Center. On January 2, 1990, Ryan hired an attorney.

Investigations by the Iowa Fire Marshal's office and an electrical engineer ensued. It was revealed that Ryan had the only key at the time of the fire (the other having been lost in the snow), the circuit breaker for the fire alarm panel had been turned off, and the battery backup to the alarm had been disconnected before the fire. The fire marshal examined the debris and the number, location, and type of burn patterns, and concluded that the fire was caused by arson. The fire marshal also concluded that flammable liquids had been used and that there were at least six separate areas of fire origin. An electrical engineer also examined the fire scene and ruled out electrical cause and origin. Laboratory tests for flammable liquids, conducted on 26 samples taken from the fire scene, were negative. However, two experts testified that, depending upon the characteristics of the flammable liquids used, the amount of water applied, and the duration of the fire, flammable liquids can be diluted, can evaporate, or can be totally consumed by fire. Thus, the presence of flammable liquids is not always detectable, and the negative test results not always conclusive.

Ryan testified at trial, and called five expert witnesses in his behalf. Ryan's theory of defense was that arcing wires in a cash register, which he accidentally knocked off of the counter, caused the fire, which then spread to the other areas of the Center. Ryan contended that the multiple burn patterns were caused by pieces of flammable materials falling from the ceiling and that the fire spread through the roof. Ryan also offered evidence that the phenomena of flashover and backdraft caused the unusual fire behavior witnessed by the firefighters.

On rebuttal, the government's experts attacked Ryan's theory involving the design of the cash register. The experts also testified that Ryan's theory of the fire's spread was inconsistent with known fire behavior.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3970SIDM

United States of America,	*
Appellee,	* Appeal from the United States District Court for the Southern District of Iowa
vs.	*
Dale Lynn Ryan,	*
Appellant.	*

Appellant's petition for rehearing has been considered by the court and is denied.

September 21, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit